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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 695

JOE ROBERT COLLIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order of the court of appeals denying a petition for a writ of mandamus and dismissing petitioner's appeal (R. 34–35) is not reported.

JURISDICTION

The order of the court of appeals was entered on June 16, 1965. A motion for leave to file a petition for a writ of mandamus seeking the reinstatement of appeal was filed in this Court on June 24, 1965. On October 25, 1965, the motion was denied, the papers submitted treated as a petition for a writ of certiorari, and the petition granted (R. 36; 382 U.S. 890). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner's motion for bond was a sufficient notice of appeal.[1]

2. If not, whether the court of appeals properly dismissed as untimely an appeal in a criminal case noticed more than 10 days after judgment but less than 10 days after the denial of an untimely motion for a new trial, which had been filed on the 9th day after verdict.

RULES INVOLVED

Rule 37(a)(2) of the Federal Rules of Criminal Procedure provides in pertinent part:

> *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. * * *

Rule 33 of the Federal Rules of Criminal Procedure provides:

> *New Trial.* The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered

[1] This question was not raised by the petition but was noticed by the Solicitor General when the record was forwarded to this Court following the grant of certiorari. Obviously, this is not a case in which the respondent would be prejudiced by the Court's taking notice of an issue not raised in the petition.

> evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

Rule 45(b) of the Federal Rules of Criminal Procedure provides:

> *Enlargement.* When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

STATEMENT

After a trial by jury in the United States District Court for the Western District of Kentucky, petitioner was convicted of transporting a female in interstate commerce for immoral purposes in violation of 18 U.S.C. 2421. He was sentenced to imprisonment for one year and a day, five months of which were to be served and the balance to be suspended on condi-

tion the petitioner be placed on probation for three years.

The jury's verdict was returned on March 24, 1965, in the presence of petitioner and his counsel (R. 6), and a formal judgment was entered on the same day (R. 7–8).

On April 2, 1965, petitioner, through new counsel, filed a motion for a new trial alleging insufficiency of the evidence and errors by the trial court in denying a motion for acquittal, admitting testimony, and commenting to the jury (R. 11–12). At the same time, he filed a motion for bail "pending a final determination, an appeal, or final adjudication in this action" (R. 10). The motion for a new trial was denied on April 5, 1965 (R. 13).[2]

On April 12, 1965, petitioner, through counsel, filed a notice of appeal (R. 15–16). He also moved at this time that service of sentence be withheld and that he be released on bond pending appeal (R. 17). On April 15, 1965, the district court denied bail pending appeal, noting that the appeal was not timely under Rule 37(a)(2) of the Federal Rules of Criminal Procedure since notice thereof had not been filed within 10 days of judgment or within 10 days after the denial of timely motions (pursuant to Rules 33 and 34, Fed. R. Crim. P.) for a new trial or in arrest of judgment (R. 18–19).

On May 21, 1965, petitioner filed a petition for a writ of mandamus in the court of appeals, which in effect was an application for bail pending appeal (R.

[2] On April 9, petitioner filed a motion in arrest of judgment (R. 14) which was denied on April 15 (R. 18–19).

28–29). On June 16, 1965, the court of appeals overruled the petition and dismissed the appeal as untimely (R. 34–35).

SUMMARY OF ARGUMENT

I

Petitioner's motion for bond, filed on the ninth day after judgment, complied with only a few of the prescribed requirements for a notice of appeal and apparently was not intended to serve as such a notice. It did evince petitioner's intention to take an appeal, however, and conveyed information from which the judgment appealed from and the court appealed to could be ascertained. The courts of appeals have been liberal in construing documents such as petitioner's motion as sufficient notices of appeal. Because such documents appear to serve the essential purposes of a notice, and since it seems unwise to consider the drafter's state of mind when determining the sufficiency of a notice, this Court may properly conclude that petitioner's motion for bond was a sufficient notice of appeal.

II

If the Court does not feel that petitioner's motion for bond was an adequate notice of appeal, we submit that the appeal was untimely and was properly dismissed.

1. Under Rule 37(a)(2), an untimely motion for a new trial cannot enlarge the time for filing a notice of appeal. The recently revised version of that Rule, which expressly recognizes this precept, reflects no

change in policy. As the Advisory Committee's note indicates, and as the context, purpose and history of the present Rule show, the revised Rule simply makes clear what was intended in the present version.

2. Rule 37(a)(2), as the majority of courts which have considered the problem have found, cannot be read in isolation from the other Rules. Since Rule 37(a)(2) contemplates that the time to appeal may be tolled only by a motion which may be granted or denied on the merits, it must be read either as referring only to a timely motion or as enlarging the time for filing motions for a new trial and in arrest of judgment. The second reading clearly conflicts with Rules 33 and 34 and is therefore impermissible. Petitioner's suggestion that an untimely motion—which may not be considered on the merits—may extend the period for appeal in effect relegates such a motion to a self-granting request for an extension of the time to appeal. This reading, too, is impermissible, since it is in conflict with Rule 45(b) and could effectively nullify the 10-day limit in Rule 37(a)(2) itself.

3. The reason for allowing a timely motion for new trial to enlarge the period for taking appeal—*i.e.*, that such a motion may affect the district court's decision as well as the appeal—is inapplicable in the case of an untimely motion. Nor does any "practical procedural need" exist for including untimely motions within the compass of Rule 37(a)(2).

4. The history of the Rule confirms the interpretation which its context and purpose compel—that present Rule 37(a)(2), like its predecessor and recently

adopted successor, does not permit the extension of its prescribed time limit by the filing of an untimely motion for new trial.

ARGUMENT

I

IN THE GOVERMENT'S VIEW, THE COURT MIGHT PROPERLY CONCLUDE THAT PETITIONER'S MOTION FOR BOND WAS A SUFFICIENT NOTICE OF APPEAL

The prescribed procedure for appealing a decision of a district court to a court of appeals in a criminal case is the filing of a timely notice of appeal with the clerk of the lower court. Rule 37(a)(1), Fed. R. Crim. P. According to the Rules, "[t]he notice of appeal shall set forth the title of the case, the name and address of the appellant and of the appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order."[3] (*Ibid.*) If such a notice is filed within ten days after entry of judgment, the appeal is timely.

On April 2, 1965, the ninth day following entry of judgment, petitioner's counsel filed a motion requesting "the court to fix a reasonable bail bond for the defendant pending a final determination, an

[3] Amended Rule 37(a)(1), promulgated by this Court on February 28, 1966, to take effect on July 1, 1966, requires only that the following be identified: the party taking the appeal, the judgment or order appealed from, and the court to which appeal is taken.

appeal, or final adjudication in this action" (R. 10). Except for the title of the case, the names of petitioner and his attorney and the latter's address, the motion contained none of the information called for in Rule 37(a)(1). Since it was filed together with a motion for a new trial, it seems reasonably clear that the document was not intended to serve as a notice of appeal;[4] and in fact it was apparently not treated as such by petitioner, his counsel or the court. Nevertheless, the motion for bond notified the court and government counsel that petitioner contemplated appealing from his conviction, and supplied sufficient information to identify the judgment from which, and the court to which, appeal was to be taken.

Documents such as this, while not fully complying with the provisions of Rule 37(a)(1), have nonetheless been considered sufficient notices of appeal. See, *e.g., Newsom* v. *Peyton,* 341 F. 2d 904 (C.A. 4) (letter); *United States* v. *Duncan,* 310 F. 2d 367 (C.A. 7), certiorari denied, 373 U.S. 938 (same); *Riffle* v. *United States,* 299 F. 2d 802 (C.A. 5) (same); *Poe* v. *Gladden,* 287 F. 2d 249, 251 (C.A. 9) (application for certificate of probable cause). Although most of the cases have involved indigent defendants acting without counsel, a similar approach is reflected in several cases involving deficient "notices" filed by counsel.[5]

[4] After the filing of a timely notice of appeal, the district court is without power to grant a motion for new trial. See *United States* v. *Smith,* 331 U.S. 469.

[5] See *Tillman* v. *United States,* 268 F. 2d 422 (C.A. 5) (motion for leave to appeal *in forma pauperis* filed by counsel); *Blunt* v. *United States,* 244 F. 2d 355 (C.A.D.C.) (same); *Sica* v. *United States,* 325 F. 2d 837 (C.A. 9), cer-

In *O'Neal* v. *United States*, 272 F. 2d 412 (C.A. 5), the court held that an appeal bond filed by counsel was sufficient as a notice of appeal. Like the motion for bond in this case, the appeal bond in *O'Neal* was not intended by counsel to serve as a notice of appeal; the court itself discovered the bond in the record and, in holding it a sufficient notice of appeal, acted *sua sponte*. Although O'Neal's appeal bond was more verbose than petitioner's motion and expressly stated that the appellant "has sued out an appeal" (272 F. 2d at 413, n. 1), we do not believe there is any substantial difference between the two documents. We suggest, therefore, that *O'Neal* and the other lower court decisions liberally construing notices of appeal are applicable here. The question remains whether these cases were correctly decided.

It may be argued that to allow a substantial deviation from the requirements of the Rules in cases where the parties are represented by counsel would rob Rule 37(a)(1) of most of its effect. But we believe that there is no compelling reason to insist that the form of notice conform precisely to that prescribed in the Rules. Ordinarily, the timely filing of a writing indicating that an appeal from a specified or readily identifiable judgment is contemplated will sufficiently inform the prevailing party that it may not yet safely close its books on the case and that it should be prepared for the possibility that the losing party will perfect an appeal. Such a writing also informs the trial court of the possibility of an appeal

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tiorari denied, 376 U.S. 952 (document filed by counsel failing to state expressly that appeal is being taken).

and is virtually as satisfactory as a more carefully drawn notice for purposes of determining whether the critical time limitations have been complied with. Thus, it would seem that the essential functions of a notice of appeal are served by a document conveying the information contained in petitioner's motion for bond.

It may also be argued that petitioner's motion should not be viewed as a notice of appeal because petitioner never intended it to serve as such, although he did contemplate that he would take an appeal. The determination of the sufficiency of a notice of appeal need not turn, however, upon an appraisal of the drafter's state of mind. Rather, it would seem desirable that the determination be made in objective and fairly mechanical terms, in order to comply with the mandate that the Rules "be construed to secure simplicity in procedure" (Rule 2, Fed. R. Crim. P.). If some notice is conveyed, that probably should be deemed sufficient.

For the foregoing reasons, the Court might properly conclude that petitioner's motion for bond was a sufficient notice of appeal[6] and, on this ground, re-

[6] The treatment of a motion for bond such as petitioner's as a sufficient notice does not mean that a district court would be without jurisdiction to consider a timely motion for new trial where that motion is coupled with a motion for bond pending appeal. In such a case, the court would be free to view the motion for bond (as indeed it could view a more carefully drawn notice of appeal) as contingent upon the disposition of the motion for new trial on its merits. Cf. *Lemke* v. *United States*, 346 U.S. 325. Alternatively, the court could suggest that the motion for bond be recast so as to relate only to the pendency of further action in the trial court, at the con-

verse the decision below dismissing the appeal as untimely.

II

AN UNTIMELY MOTION FOR A NEW TRIAL DOES NOT EXTEND THE TIME FOR APPEAL IN CRIMINAL CASES

Assuming that petitioner's motion for bond was not a sufficient notice of appeal, no notice of appeal was filed until 19 days after final judgment (R. 15–16). Consequently, unless petitioner's motion for a new trial (R. 11–12) tolled the 10-day period for taking an appeal under Rule 37(a)(2) (*supra,* p. 2), his appeal was out of time and was properly dismissed by the court of appeals.[7] See *United States* v. *Robinson,* 361 U.S. 220. The motion for new trial, however, made 9 days after verdict and judgment, was itself untimely under Rule 33 (*supra,* pp. 2–3), which fixes the time for filing a motion for new trial on grounds other than newly discovered evidence at 5 days after verdict or finding of guilt. This untimely motion, we submit, cannot be considered in calculating the time within which an appeal may be taken under Rule 37(a)(2).

1. On February 28, 1966, this Court entered an order, effective July 1, 1966, amending Rule 37(a)(2) to provide, in pertinent part, as follows:

> The notice of appeal by a defendant shall be filed within 10 days after the entry of the judgment or order appealed from. * * * If a

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clusion of which a new notice of appeal could, of course, be filed.

[7] Petitioner does not claim that his untimely motion in arrest of judgment, filed more than 10 days after entry of judgment, extended the time for noticing an appeal.

> *timely* motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of the order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of judgment. [Emphasis supplied.]

These provisions were drafted by the Advisory Committee on Appellate Rules in response to this Court's suggestion in *Lott* v. *United States*, 367 U.S. 421, 425, n. 9,[8] and were submitted to the Judicial Conference's Committee on Rules of Practice and Procedure on March 31, 1964 (34 F.R.D. 263). Some parts of the revised rules, including portions of amended Rule 37(a)(2), were recognized in the Advisory Committee's notes as "new" or as "chang[ing] the present rule" (see 34 F.R.D. 276, 277), but this was not the case with the provisions quoted above. Noting that the "question has arisen" as to whether an untimely motion for new trial extends the time for taking an appeal, the Advisory Committee stated that "[t]he proposed statement *makes it clear* that only a timely motion will have" that effect (34 F.R.D. 277; emphasis supplied). The revised rule embodies no

[8] Recognizing "the obscurity, if not inconsistency," in the various rules bearing on the question involved in this case, the Court in *Lott* found it unnecessary to resolve the issue but stated that it "may and should leave that problem and its kindred ones * * * for resolution by the rule-making process * * *" (367 U.S. at 425).

change of policy. As we shall show, it merely clarifies what, in light of established practice, must have been the intention underlying Rule 37(a)(2) in its present form.

2. Petitioner contends that present Rule 37(a)(2) must be read without regard to any other rule. But every court which has considered the question, with one exception, has agreed that Rule 37(a)(2) must be read in conjunction with Rules 33 and 34. *United States* v. *Bertone*, 249 F. 2d 156 (C.A. 3); *O'Neal* v. *United States*, 264 F. 2d 809, 812 (C.A. 5); *Lott* v. *United States*, 280 F. 2d 25 (C.A. 5), reversed on other grounds, 367 U.S. 421; *United States* v. *DeRocco*, 320 F. 2d 58 (C.A. 6); *Godwin* v. *United States*, 185 F. 2d 411 (C.A. 8); *Marion* v. *United States*, 171 F. 2d 185 (C.A. 9), certiorari denied, 337 U.S. 944; *Pugh* v. *United States*, 197 F. 2d 509 (C.A. 9).[9] Only the Tenth Circuit has taken the view that Rule 37(a)(2) may be read in isolation and that an untimely motion for new trial can enlarge the time for filing an appeal. *Lujan* v. *United States*, 204 F. 2d 171; *Smith* v. *United States*, 273 F. 2d 462. In so doing, however, that court has recognized that its view "creates an anomalous situation" while the majority decisions "tend to harmonize" the Rules (273 F. 2d at 465).[10]

[9] See also *Dickey* v. *United States*, 332 F. 2d 773 (C.A. 9); *Rayor* v. *United States*, 323 F. 2d 519 (C.A. 9), certiorari denied, 375 U.S. 993; *Fallen* v. *United States*, 306 F. 2d 697 (C.A. 5), reversed on other grounds, 378 U.S. 139.

[10] In *Smith*, *supra* at 465, the court declined to overrule *Lujan* partly on the ground that appellate courts should overrule decisions only for the most compelling reasons, particularly where

Such coordination, we submit, is essential under the present rules. In cases where a motion for a new trial or in arrest of judgment extends the time to appeal, Rule 37(a)(2) provides that an appeal "may be taken within 10 days after entry of the order denying the motion." In referring to an order *denying* a motion, the authors of the rule presumably contemplated an order entered after consideration of the motion on its merits. On this assumption, and in view of the fact that the courts lack jurisdiction either to grant or deny untimely motions under Rules 33 or 34, but must dismiss them (*United States* v. *Robinson*, 361 U.S. 220, 224–226; *Marion* v. *United States*, 171 F. 2d 185 (C.A. 9), certiorari denied, 337 U.S. 944), two readings of Rule 37(a)(2) are logically possible. The rule may apply only to motions that are timely under Rule 33 or 34; this is our view and that of most of the courts which have passed on the question. Otherwise, the rule must be read as providing that any motion for new trial or in arrest of judgment is timely, and thus may be granted or denied on the merits, if it is filed within ten days after judgment.

The second reading is clearly impermissible. As the court stated in *United States* v. *Bertone*, 249 F. 2d 156, 159 (C.A. 3):

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the error cannot be corrected without substantial injury to litigants. Significantly, the appellant in *Smith*, convicted as a first offender on narcotics charges, faced a 52-year sentence. In *Lujan*, *supra*, the court was apparently influenced by the fact that, on the day of sentence (7 days after verdict), the trial court entered an order purporting to grant the appellant leave to file within ten days thereafter a motion for a new trial, which appellant filed within the time prescribed in the court's order.

> * * * This [reading] would have the effect of writing out of Rule 33 the specific limitation that a motion for a new trial based on grounds other than newly discovered evidence "shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period." We cannot agree to a construction of Rule 37(a)(2) which would thus eliminate the 5-day limitation of Rule 33 and substitute a period which would always be at least 10 days and could be much longer than that. * * *

The construction adopted by the court below, on the other hand, harmonizes the provisions of Rules 33, 34, and 37(a)(2), giving full effect to each, and "thus carries out what must have been the intent of the Supreme Court in promulgating * * * [these] rules at the same time" (249 F. 2d at 158).

Petitioner unsuccessfully seeks to avoid the need for reading Rule 37(a)(2) in conjunction with other Rules by suggesting that, in referring to an order *denying* a motion for new trial, the rule also contemplates an order *dismissing* such a motion as untimely. Under this view, the rule would permit an enlargement of the time to appeal upon the filing of untimely, as well as timely, motions for new trial. But this reading of Rule 37(a)(2) does even more damage to the Rules as a whole than the construction criticized in Bertone, *supra.*

Petitioner recognizes that an untimely motion for new trial cannot be considered on the merits. In effect, therefore, his suggestion relegates such a motion to the unique status of a self-granting request for an

extension of the time in which to file a notice of appeal. Such a construction is hardly in keeping with the precept that the Rules are to be construed "to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay" (Rule 2, Fed. R. Crim. P.). Moreover, petitioner's interpretation is plainly in conflict with Rule 45(b) (*supra*, p. 3), which prohibits the district court from granting an application to extend the time to appeal. Under petitioner's interpretation, a defendant who could not obtain an extension of the time to appeal through a request to the court may nevertheless—without making any request—automatically obtain at least a 10-day extension simply by filing an untimely "motion for a new trial" within ten days after judgment. Thus, notwithstanding the clear intent of the rules to fix the time for appealing at ten days[11]—unless there is pending in the district court some motion which could affect the outcome of the case—petitioner's rule would permit any defendant to wait at least twenty days before filing an appeal.[12]

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[11] See *United States* v. *Robinson*, 361 U.S. 220; *Berman* v. *United States*, 378 U.S. 530.

[12] Petitioner asserts that "there is scarcely any temptation to file a motion for a new trial or in arrest of judgment which is intentionally late under Rules 33 or 34 in order to obtain more time in which to appeal" (Pet. Br. 12). Even if this is so, it is no reason to adopt a rule which would permit a doubling of the maximum time expressly provided for in Rule 37(a)(2). Moreover, the primary purpose for establishing a short period for filing criminal appeals was to avoid the great delays occasioned by the 3-month period in existence before the advent of the Criminal Appeal Rules. See Orfield, *Federal Criminal Appeals*, 45 Yale L.J. 1223, 1231 (1936); Note, *Federal Criminal*

3. There are ample reasons for allowing a timely motion for a new trial on grounds other than newly discovered evidence[13] to extend the time for appealing. Such a motion may affect the judgment of the district court, thus making an appeal unnecessary or inadvisable, and consideration of the district court's decision denying such a motion may often properly form a part of the case on appeal. Moreover, the interest in finality of judgments ordinarily does not come into play while a timely motion for new trial is pending in the district court. None of these reasons apply in the case of an untimely motion. Accordingly, the authors of the recent clarifying amendment to Rule 37(a)(2) (see pp. 11–12, *supra*) expressly limited its operation to timely motions under Rules 33 and 34.

Contrary to petitioner, no "practical procedural need" compels adoption of his interpretation of Rule 37(a)(2)—which he candidly recognizes may be felt to create "a pointless artificiality" (Pet. Br. 11). The issues cognizable on a motion in arrest of judgment—challenges to the jurisdiction of the court or the sufficiency of the indictment—are apparent long before verdict. Trial errors forming the basis for a motion for a new trial are likewise evident by the time of verdict, at least to the extent necessary for deciding whether to seek an extension of time within which to file such a motion. The practical impor-

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Appeals Under the 1934 Rules, 52 Harv. L. Rev. 983 (1939); Note, *Timely Appeals and Federal Criminal Procedure*, 49 Va. L. Rev. 971, 972 & nn. 6 & 7 (1963).

[13] A motion for new trial based on newly discovered evidence may be filed before or within two years after final judgment. Rule 33, Fed. R. Crim. P.

tance of giving early attention to these matters, moreover, was clearly pointed out by this Court in *United States* v. *Smith*, 331 U.S. 469, 476, as follows:

> * * * [A]s time passes, the peculiar ability which the trial judge has to pass on the fairness of the trial is dissipated as the incidents and nuances of the trial leave his mind to give way to immediate business. It is in the interest of justice that a decision on the propriety of a trial be reached as soon after it has ended as is possible, and that decision be not deferred until the trial's story has taken on the uncertainty and dimness of things long past.

The only "practical procedural need" pointed to by petitioner for acceptance of his interpretation arises from his assertion that "[c]omputation of time limits under Rules 33 and 34 is not without difficulties" (Pet. Br. 11). But computation of the 5-day period under these Rules is no more difficult than computation of the 10-day period under Rule 37(a)(2) or, for that matter, of the 20-day period which could result from petitioner's interpretation.[14] Difficulties of computation might support the argument that the trial court should be empowered to extend the time for filing an appeal upon a showing

[14] It is important to note that the 5-day period for making a motion for new trial begins at the time of *verdict or finding of guilt*, while the 10-day period for filing an appeal does not begin until *judgment*. Particularly in the frequent case in which the court calls for a pre-sentence report, the time for taking appeal may not start until long after the time for moving for a new trial has elapsed. In such circumstances, it seems most unlikely that the untimely filing of a motion for new trial within ten days after judgment could be attributed to difficulties of computation.

of excusable neglect, and revised Rule 37(a)(2) has a provision to this effect.[15] As this Court held in *Robinson,* however, the present rule clearly does not permit such an extension. Even if it did, it would avail petitioner nothing. He made no application to the trial court for relief on the basis of excusable neglect, and there is nothing in the record to suggest that the untimeliness of petitioner's notice was due to excusable neglect.[16]

4. The history of Rule 37(a)(2) confirms the interpretation which its context and purposes compel—*i.e.,* that only a timely motion for a new trial can extend the time for filing a notice of appeal.

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[15] The Advisory Committee's note incorporates the comparable note with respect to civil cases, which observes in part (34 F.R.D. 276): "In view of the ease with which an appeal may be perfected—the filing of a simple notice with the clerk of the district court—no reason other than failure to learn of the entry of judgment should ordinarily excuse a party from the requirement that the notice be timely filed. But the district court should have authority to permit the notice to be filed out of time in extraordinary cases where injustice would otherwise result."

[16] No special circumstances are alleged, and none appears in the record, which call for relaxation of the rule that the time to appeal fixed by Rule 37(a)(2) is jurisdictional and cannot be enlarged. Petitioner was neither ill nor without counsel at the critical time for appealing, as was the defendant in *Fallen* v. *United States*, 378 U.S. 139. There is no suggestion of fraud, deceit, or inadequate representation by counsel. See *Peoples* v. *United States*, 337 F. 2d 91, 93 (C.A. 10), certiorari denied, 381 U.S. 916. Petitioner and his counsel clearly had notice of the date of judgment. Cf. *Rosenbloom* v. *United States*, 355 U.S. 80. Moreover, counsel was put on notice by the 1963 decision in *United States* v. *DeRocco*, 320 F. 2d 58, that the law in the Sixth Circuit followed established precedent in requiring that a motion for a new trial be timely filed in order to toll the time for filing an appeal.

The predecessor of Rule 37(a)(2) was Rule III of the Criminal Appeals Rules, promulgated on May 7, 1934 (292 U.S. 659, 662–663). It provided that "[a]n appeal shall be taken within five (5) days after entry of judgment of conviction, except that where a motion for a new trial has been made within the time specified in subdivision (2) of Rule II,[17] the appeal may be taken within five (5) days after entry of the order denying the motion." Under this rule, it was well settled that an untimely motion for a new trial did not extend the time for taking an appeal. *Decker* v. *United States,* 97 F. 2d 473 (C.A. 5); *O'Gwin* v. *United States,* 90 F. 2d 494 (C.A. 9); *Fewox* v. *United States,* 77 F. 2d 699 (C.A. 5).

The present rule was promulgated on February 8, 1946 (see 327 U.S. 825, 857–858), after nearly twelve years of practice under Criminal Appeals Rule III. Although there were some necessary changes in language in the new rule,[18] the Advisory Committee's note indicates that the only change in substance relevant here was the enlargement of the time for taking appeal from 5 to 10 days.

Petitioner attempts to find support for his inter-

[17] That rule fixed the time for filing a motion for new trial at 3 days after verdict or finding of guilt. Rule II(3) fixed the time for filing motions for new trial based on newly discovered evidence at 60 days after final judgment. 292 U.S. at 662. A motion for a new trial on the ground of newly discovered evidence did not extend the period for taking appeal. See *Fewox* v. *United States,* 77 F. 2d 699 (C.A. 5).

[18] Thus, no shorthand reference could be made in the new rule to Rule 33, similar to the reference in the old rule to Rule II(2), since Rule 33 dealt with all motions for new trial, including those based on newly discovered evidence.

pretation of Rule 37(a)(2) in the fact that the first preliminary draft of that Rule (then numbered 35 (a)(2)) provided that "if a motion for a new trial has been made seasonably, an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion." This phraseology was obviously unsatisfactory since it would have permitted the time for appeal to be extended by a seasonable motion for new trial based on newly discovered evidence, which, under that draft, could be made "at any time before or after final judgment" (Preliminary Draft, Rule 31(c)). Accordingly, petitioner may not read into the rejection of this proposed formulation an intent to change years of practice by allowing an unseasonable motion to extend the time to appeal.

Petitioner fails to point out that the Second Preliminary Draft of the Rules replaces the phrase, "if a motion for a new trial has been made seasonably," with "if a motion for a new trial *is then pending*" (Second Preliminary Draft, Rule 39(a)(2); emphasis supplied). This version avoids inclusion of motions based on newly discovered evidence made more than 10 days after judgment. The reference to a "pending" motion, moreover, strongly suggests that only a motion which could be considered on the merits—*i.e.*, a timely motion—was contemplated. The language of the second revision was unsatisfactory, however, because it may have left some doubt as to what was meant by the word "then". To erase any doubt, the present Rule substituted for "is then pending" the phrase, "has been made within the 10-day pe-

riod." It seems clear that, notwithstanding these changes in language, no change in meaning was intended. The present Rule 37(a)(2)—like its predecessor and its recently adopted successor—does not permit the extension of its prescribed time limit by the filing of an untimely motion for new trial.

CONCLUSION

If this Court finds that petitioner's motion for bond constituted a sufficient notice of appeal, the cause should be remanded to the court of appeals for disposition on the merits. If it concludes otherwise, we respectfully submit that the order of the court below should be affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 695.—October Term, 1965.

Joe Robert Collier, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[April 19, 1966.]

Per Curiam.

On March 24, 1965, a jury in a federal district court found petitioner guilty of violating the Mann Act, 18 U. S. C. § 2421 (1964 ed.), and a formal judgment was entered against him on the same day. Nine days later, on April 2, 1965, a new trial motion was filed by petitioner's counsel alleging various errors at trial. Since Fed. Rules Crim. Proc. 33 expressly requires that a new trial motion not based on newly discovered evidence be filed within five days of the verdict, petitioner's motion was untimely and the District Court denied it on April 5, 1965. On April 12, 1965, seven days after the denial of the motion and 19 days after the judgment, petitioner through counsel filed a notice of appeal from his conviction. The Court of Appeals for the Sixth Circuit dismissed the appeal as untimely, a ruling in accord with the views of several other circuits but in conflict with those of the Tenth Circuit. Compare, *e. g.*, *United States* v. *Bertone*, 249 F. 2d 156 (C. A. 3d Cir.), with *Smith* v. *United States*, 273 F. 2d 462 (C. A. 10th Cir.). Treating petitioner's petition for mandamus as one for a writ of certiorari, we granted certiorari, 382 U. S. 890, to consider the timeliness question, left open in *Lott* v. *United States*, 367 U. S. 421, 425. We reverse the Court of Appeals and remand the case to allow petitioner's appeal to be heard.

Federal Rules of Criminal Procedure 37 (a)(2), entitled "Time for Taking Appeal," provides in relevant part that "[a]n appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion." Plainly petitioner's appeal was timely if this Rule is literally read since the appeal was filed within 10 days after denial of a new trial motion itself filed within 10 days of the judgment of conviction. To the contrary, the Government argues that a new trial motion, not based on newly discovered evidence, filed more than five days after the verdict and so destined to be rejected as untimely under Rule 33 should not serve to give defendant an extension of time to appeal since there is no possibility the appeal will be avoided by a grant of the motion. Further support is found by the Government in a number of Court of Appeals' decisions adopting this view, in the history of Rule 37 (a)(2), and in a very recent amendment to that Rule which plainly adopts the Government's basic approach for the future.*

We believe competing interests outweigh the Government's arguments. The literal language of Rule 37 (a)(2) sustains petitioner and even a perceptive read-

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*The amendment, approved by the Court on February 28, 1966, and absent disapproval by Congress effective on July 1, 1966, pertinently provides: "If a *timely* motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of the order denying the motion." (Emphasis added.) Thus the effect of the amendment is to embrace prospectively the Government's view of the interrelationship between Rules 33 and 37 (a)(2). A contemporaneous amendment to Rule 33 would extend the time for filing a new trial motion from five to seven days.

ing of Rules 33 and 37 (a)(2) together would not dispel all doubt. A criminal appeal is at stake and under Fed. Rules Crim. Proc. 45 (b) the period for taking it may not be extended, while the rare and relatively brief delay in appeal allowed by petitioner's construction causes very little injury to the Government. In these circumstances a reading that departs from the literal terms of Rule 37 (a)(2) by constricting the opportunity to appeal seems to us inappropriate. Because of our disposition we need not consider a suggestion by the Government, apparently not made to or passed on by the Court of Appeals in this case but first tentatively raised after the grant of certiorari and only later pressed upon us in oral argument, that on the present facts a motion for bail bond filed by petitioner nine days after his conviction may do unintended service as a notice of appeal.

Reversed and remanded.

MR. JUSTICE BLACK concurs in the Court's judgment for the reasons stated in the opinion of the Court of Appeals for the Fifth Circuit in *O'Neal* v. *United States*, 272 F. 2d 412.

END